UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

ORVAL KENT FOOD CO., INC. [1]

Employer

and

PRODUCTION AND MAINTENANCE UNION, LOCAL 101, AN AFFILIATE OF CHICAGO TRUCK DRIVERS UNION

Petitioner

Case 13-RC-20089

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record [2] in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[3]

3. The labor organization(s) involved claim(s) to represent certain employees of the Employer.[4]

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act exists for the following reasons:

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[1] The names of the parties appear as amended at the hearing.

[2] The arguments advanced by the parties at the hearing and in their briefs have been carefully considered.

[3] The Employer is a corporation engaged in the business of manufacturing of prepared salads and dessert products at its plant in Wheeling, Illinois

[4] United Food and Commerical Workers, Local 546 (herein the “Intervenor”) intervened in this proceeding on the basis of its collective bargaining agreement with the Employer and as the incumbent representative of the employees in the unit involved herein.

The Intervenor and the Employer take the position that a collective bargaining agreement they executed on February 24, 1999, is a bar to the processing of the instant petition. The Petitioner, on the other hand contends, the February 24, 1999, agreement by its terms requires ratification by the unit employees and, as this never took place, the agreement can not act as a bar to the processing of its petition. In support of its position the Petitioner cites the following language contained Article 12, Section J of the February 24, 1999 agreement between the Employer and the Intervenor:

> This Agreement represents a settlement of all issues after extensive collective bargaining between the Parties. The Employer, the Union and all Bargaining Unit Employees by means of the ratification of this Agreement, expressly waive the right to bargain upon any subject, except as provided for in the applicable Federal Labor Case Law, whether or not the same was mentioned and/or discussed during the course of said collective bargaining, required by Section 8(D) of the National Labor Relations Act at the end of this Agreement.

FACTS

The Employer manufactures prepared salads and desserts. The Employer and the Intervenor have had a collective bargaining relationship spanning a number of years including a collective bargaining agreement (CBA) that ran from 2/17/95 to 2/16/98, and a one year addendum to that contract that ran from 3/24/98 to 2/16/99. The Employer and the Intervenor have a current CBA that was executed on February 24, 1999, effective by its terms from February 17th, 1999 to February 16th, 2002.

Negotiations for the most recent contract began around January 25, 1999. The Employer and Intervenor met approximately eight times during the contract talks. During the first week of contract talks, the Employer and Intervenor's representatives met around two to three times. The remainder of meetings occurred at various times prior to February 10, 1999. During the relevant time period, David Lambert, the Wheeling plant director, served as the one of the Employer's chief negotiators. Dennis Gorman, business agent and Executive Vice President of the Local, and Jaime Garcia, a business agent, represented the Intervenor. The Intervenor's negotiating committee also included six employees from the bargaining unit, including Carol Fritch, Jose Moncada, and Doug Wise. These individuals attended all of the contract meetings. Moncada and two other employees on the bargaining committee speak Spanish.

Although the record does not present in great detail what was said at the various meetings, certain facts are clear. Dennis Gorman was the Intervenor's primary spokesperson during the negotiations and was responsible for determining what constituted the Employer's final offer to be submitted to the employees for a vote. At the beginning of negotiations on January 25, 1999, both the Employer and the Intervenor had a list of economic and noneconomic demands which they presented. Among the various demands made, the Intervenor had requested an $.80 an hour increase in wages for its members. Through the process of negotiations, the parties came to an understanding which took the form of a draft contract around February 10, 1999. The Employer's final proposal included a 2.7% wage increase for the first year which averages out to around 8-

10 cents an hour depending on a particular employee's grade. Witnesses testified at the hearing that the general consensus of the room around February 10th was that the parties had arrived at a good contract.

The parties did not discuss the ratification language in Article 12, Section J, at any time during the negotiations. The Employer's and Intervenor's notes, entered into evidence, also made no mention of the contract ratification issue. Nor did the parties discuss the Petitioner's recent efforts to organize the Wheeling plant's employees or any need to quickly complete negotiations because of this organizing campaign. From the record, the Employer does not appear to have been aware of the Petitioner's efforts to organize until around February 17, 1999.

At the final meeting concerning the CBA, Dennis Gorman informed the negotiations committee that he would have to submit the contract to the unit members for a vote. Because of prior commitments, Gorman and David Lambert set the date for the membership contract proposal on February 17, 1999. He requested the Employer to devise a meeting schedule that broke the plant down into groups of 25 and that a vote be taken in a converted racquet ball room in the plant's basement. As required by the Intervenor's constitution, a notice was posted to unit members outside of the employee lunch room. Either Jaime Garcia or Suzanna Alvarez composed the notice because the notice contained a translation in Spanish. The notice was typed and posted by Lisa Torres, a shift manager at the plant. The record does not present the exact date or time of the posting but it is clear that it was posted prior to the employee meeting on February 17, 1999. It also appears from the record that this was the only notice the Intervenor and Employer gave to the membership.

Before the employees were to cast their votes on the new CBA proposal, Dennis Gorman and Jaime Garcia explained to the employees what changes the contract contained. Gorman and Garcia explained the Employer's last and final offer during half-hour meetings that covered all the employees in the unit. The employees already knew what the meeting concerned and refused to vote on the proposed contract. The employees listened to the contract proposal, but walked out on the meetings and refused to vote until an election was held to determine who would represent them. According to a witness for the Petitioner, Gorman told the employees that if they did not vote on the proposal, the Intervenor would sign the contract anyway. The Employer's representative Lambert was not aware of the Petitioner's organizing activities at the plant until Gorman explained the problems with the contract proposal meeting. After the employee's refusal to vote on February 17, Gorman did not request any further negotiations with the Employer.

On February 23, 1999, the president for the Intervenor's Local, Robert Vaughn contacted the International Union's president, Doug Doreghty, in Washington, D.C. After the local explained the membership's refusal to vote on the new contract, the International Union's president authorized the Local's Executive Board to accept or reject the contract. Once informed of this, the Intervenor's secretary, Jeanine Collier, called the seventeen members of the Intervenor's Executive Board and polled them concerning the proposed CBA. A tally of the Executive Board's vote indicated a unanimous acceptance of the Employer's final offer. Following the Executive Board's authorization as to the contract, Dennis Gorman called David Lambert and explained that

his leadership had instructed him to sign the contract. Later that afternoon, on February 24, 1999, Gorman signed the contract with David Lambert. Soon after the signing, Kenneth Boyd wrote a notice to the membership of the Executive Board's acceptance of the contract. Dennis Gorman and Felipe Morales, the Intervenor's regional representative, handed out the notice to the employees.

The February 24th signing of the CBA does not represent the first time the Intervenor's leadership has authorized a CBA's acceptance without a vote of the membership. Kenneth Boyd, the Secretary/Treasurer for the Intervenor, testified that on three other occasions, that he was aware of, the Intervenor had accepted a contract based on the votes of the Executive Board; once in December of 1998, and on two other occasions in 1994. Unlike the instant petition, none of these these situations involved a rival union. At all other times, it appears from the record that the Local presented contract proposals to the employees for a vote.

Article 23(D)(3) of the Intervenor's International constitution and Article 6(D) of the Intervenor Local's By-Laws provide that an employer's final proposal for a CBA must be submitted to the affected membership for a vote. The Local must obtain a majority vote to accept the employer's proposal. In the event that the Local does not obtain a majority vote, Article 23(D)(6) of the Intervenor's International Constitution provides the authority to the Local's Executive Board, after conferring with the International President, to accept or reject the employer's offer. Article 23(D)(8) of the same constitution requires adequate notice to the membership of all meetings required by Article 23(D).

The contract does not explain the meaning of Article 12, Section J or the use of the term "ratification." According to hearing testimony, this language has been in the Intervenor's collective bargaining agreement since 1986. None of the witnesses at the hearing were able to present any evidence on the bargaining history of Article 12, Section J, or why the language of that article was written the way it was.

ANALYSIS

The Petitioner contends that the February 24th agreement between the Employer and the Intervenor by its express terms requires ratification by the employees, the employees never ratified the agreement, and, thus, it can not serve as a contract bar to its petition. The Intervenor and the Employer, on the other hand, contend that there is no express provision in the agreement requiring ratification of the agreement by employees as a condition precedent to its validity, and, thus, in their view, the agreement serves as a bar to the processing of the instant petition.

The leading case on ratification as a condition precedent to contractual validity states the rule as follows, "Where ratification is a condition precedent to contractural [sic] validity by express contractural [sic] provision, the contract will be ineffectual as a bar unless it is ratified prior to the filing of a petition, but if the contract itself contains no express provision for prior ratification, prior ratification will not be required as a condition precedent for the contract to constitute a bar." *Appalachian Shale Products Co*., 121 NLRB 1160, 1163 (1958). Ratification as a condition precedent to a contract serving as a bar to the processing of a representation petition cannot be established by parol or other extrinsic evidence. Rather, such a finding can only be based upon an

examination and construction of the specific language used in the agreement in question. *Merico, Inc*., 207 NLRB 101, fn. 2 (1973) . *United Health Care Services, Inc*., 326 NLRB No. 144 (1998). The Board, in limiting ratification as a contract bar issue to those circumstances in which it was expressly set forth in the contract, stated that this rule was "consistent with the Board's view that every effort should be made to eliminate the litigation of factual issues such as these in representation cases and to give greater weight to the language of the contract itself". *Appalachian Shale, supra* at 1162-63. Based on the relevant caselaw and the facts of this case, it is the opinion of the undersigned that there is no express provision in the contract at issue that requires ratification as a condition precedent to its validity.

Typical express ratification language was exemplified in the case *American Broadcasting Co*., 114 NLRB 7 (1955); see also*, Merico, Inc*., 207 NLRB 101 (1973)("The Union Committee is Unanimous for acceptance and each member is hereby pledged to recommend this agreement for ratification by the membership . . ."); *Swift & Co*., 213 NLRB 49, 51 (1974) ("It is understood that this agreement is signed by the Union subject to ratification by the Local Unions"). In *American Broadcasting*, the parties executed a contract "effective the day following notice of ratification by [union] membership." *Id*. at 8. The contract in that case was indeed ratified by the membership, but only after the petition was filed. *Id*. Thus, a contract must clearly state that ratification must be secured in order for a contract to be binding, and the ratification must be obtained before a petition is filed for that contract to be a bar to an election.

Herein, there is no express agreement that ratification by employees is a condition precedent to the contract's validity. While the agreement uses the term "ratification" in Article 12, Section J, that term is merely used incidentally in setting forth a waiver of bargaining rights by the parties, including employees, upon entering into the agreement. At best, the use of the term "ratification" in Article 12, Section J of the agreement is ambiguous. While the identities of the parties waiving their rights are clearly set forth, it is not clear to whom the term "ratification" applies, and its usage in that Section can be interpreted as being synonymous with the term "execution". Unlike the contract language mentioned in *American Broadcasting*, *Merico*, or *Swift & Co*., *supra*, Article 12, Section J makes no mention or implication that the contract's validity is conditioned upon ratification. For example, the Board in *Merico* noted the conditional nature of the contract language: "[t]he use of the phrase 'for acceptance' in this context indicates to us that although the terms were acceptable to the Union Committee, it was not purporting to accept them unconditionally on behalf of the employees." *Supra* at 1. The provision in the instant proceeding explicitedly conditions nothing other than a waiver of bargaining rights on ratification, and there is no other language in the agreement which would give a the term "ratification" a broader construction.

As the Petitioner recognizes in its brief, consideration of extinsic evidence regarding past practices and whether the Intervenor complied with its own constitution and/or bylaws with regard to obtaining employee ratification of the February 24th agreement can not be considered under Board precedent. Hence, I make no findings on these matters. *Merico, supra* at 102.

However, the Petitioner does contend that the February 24th agreement was unlawfully entered into because the Intervenor had lost the support of a majority of the

bargaining unit at the time it entered into that agreement and, thus, it can not be a bar to the instant petition, citing *Point Blank Body Armor, Inc.*, 312 NLRB 1097, fn.1 (1993). In that case the Board found that it was an unfair labor practice for an employer and incumbent union to execute a collective bargaining agreement in the face of a rival organizing campaign and petitions by a majority of unit employees desiring representation by the rival union. Thus, consideration of the Petitioner's contention in this regard would require the undersigned to make findings of fact and conclusions of law concerning unfair labor practices in the context of a representation proceeding. The Board has long held that that it will not permit the litigation of unfair labor practices in representation proceedings. *National Foundry Company of New York, Inc*., 109 NLRB 357, 358-359 (1954). In that case the Board refused to consider a petitioner's allegations that the contract in question should not be a bar because Section 8(a)(2) of the Act was violated on the basis that the person signing the agreement for the union was a supervisor of the employer. Accordingly, the undersigned can make no findings that would preclude the February 24th agreement from serving as bar to the instant petition based upon the Petitioner's contention that it was unlawfully entered into by the Employer and the Intervenor.

The Petitioner also contends that, if ratification of the February 24th agreement is not required, the agreement is so indefinite in its terms that it can not serve as a contract bar. In support of this contention, the Petitioner asserts that, absent ratification, the waiver of bargaining rights provision of the agreement would be inapplicable and all subjects of the contract would be subject to renegotiation. The Petitioner cites no authority in support of its position, and the undersigned is unaware of any authority by the Board finding that the absence of a "waiver" of 8(d) bargaining rights makes a collective bargaining agreement so indefinite as to be invalid. To the contrary, waiver provisions are narrowly construed under Board law so as to not unnecessarily preclude continuing collective bargaining on issues regarding terms and conditions of employment as they arise.

Finally, the Petitioner on equitable grounds asserts that the employees' freedom of choice would be thwarted if the Febraury 24th agreement is found to be a bar to its petition, citing *Hills and & Sanders-Wheaton, Inc.*, 195 NLRB 1137 (1972) for the proposition that the contract-bar rules should not be so inflexible as to exclude deviations in unusal circumstances. However, I find that case to be *inapropos* as the Board therein found an extension agreement of indefinite duration, that otherwise would not bar a third party petition, constituted a bar because the intervenor therein was complying with Federal wage-price freeze and could not complete negotiations for a new agreement. While the Petitioner's argument has some appeal in the circumstances of the instant case, deviating from requirements set forth by the Board in *Appalachian Shale, supra* would open up the pandora's box of litigation of factual issues in representation cases that the Board has long sought to avoid. Accordingly, based upon the foregoing and the entire record herein, I find that the February 24th agreement constitutes a bar to the processing of the instant petition, and I shall, therefore, dismiss it.

ORDER

IT IS HEREBY ORDERED that the petition filed be, and it is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this decision may be filed with the National Labor Relations Board and addressed to the Executive Secretary, Franklin Court Building, 1099-14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by May 13, 1999.

DATED at Chicago, Illinois this 29th day of April, 1999.

/s/ Elizabeth Kinney
Elizabeth Kinney, Regional Director
National Labor Relations Board,
Region 13
200 West Adams Street, Suite 800
Chicago, Illinois 60606

347-4020-3350-5000, 530-6033-9200-0000, 530-6050-6625-0000, 530-8031-5000-0000

Orval Kent Food Co., Inc.
13-RC-20089

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(Includes 8(b)(7)(C) cases and Decision granting AC, UC, or UD)

Case Number 13-RC-20089

Employer's Name Orval Kent Food Co., Inc.

Date of Decision

Was issuance of decision delayed by concurrent C case? ☐ Yes ☒ No

If yes, enter Case Number 13-

Hearing closed date April 7, 1999

Industry manufacturer of salads and desserts

Unit description code:
☐A = overall industrial plus any other classification
☐C = craft, one or more
☐D = departmental, one or more
☐G = guards
☐W = office, clerical, sales & other white collar workers
☐P = professional and/or technical employees
☐R = combination of W & P
☐T = Teamsters (only when petitioner is Teamsters)
☐Z = residual

Special type of election?
☐1 = Sonotone ☐2 = Globe ☐3 = Sonotone & Globe ☐4 = craft severance
☐5 = sever department ☐6 = sever other ☐7 = ZIA ☐8 = other

Drafted by Hitterman Reviewing Supervisor Eggertsen

Number of employees in unit 160

Date case assigned April 14, 1999

Date request for review due

Date last brief timely received April 19, 1999

REQUIRED ATTACHMENTS: None entered in CHIPS computer by:_____
(operator's initials)